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No. 04-1581

IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE CATO INSTITUTE, THE GOLDWATER INSTITUTE, THE INSTITUTE FOR JUSTICE, THE REASON FOUNDATION, AND THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional protections for political activity – including speech, assembly,

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

and petitioning – relating to governmental policies and conduct, which lies at the very heart of the First Amendment.

The Goldwater Institute was founded in 1988 by a small group of entrepreneurial Arizonans with the blessing of Sen. Barry Goldwater. Through research and education, the Goldwater Institute works to broaden the parameters of policy discussions to allow consideration of policies consistent with the founding principles of free societies. Central to the mission of the Goldwater Institute's Center for Constitutional Government is studying the constitutional implications of campaign finance reform. The issues presented in this case are of interest to the Goldwater Institute because of the critical role non-profit organizations play in the dissemination of core political speech. The Goldwater Institute fully supports their right to communicate views about candidates and policy issues at any time, especially, as this case illustrates, in the days leading up to an election..

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between freedom of speech, assembly, and petitioning on the one hand and repressive government mandates on the other, and thus touches the very core of IJ's mission and ideals.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicat-

ing libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech, assembly, and petitioning, and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the protection of core political speech and association lies at the heart of the First Amendment. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Elk Grove Unified School District* v. *Newdow*, 524 U.S. 1 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

STATEMENT

The district court dismissed WRTL's challenge because it incorrectly believed that this Court's decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), "leaves no room for" the challenge presented here. Jurisdictional Statement Appendix (J.S. App.) 2a. Incorporating its reasoning from its denial of a preliminary injunction, the district court concluded that the *McConnell* decision foreclosed *all* as-applied challenges to BCRA's restrictions on "electioneering communications." J.S. App. 3a, 7a-8a. *Amici* here will leave discussion of that error (addressed in the first Question Presented) in the capable hands of Appellants and others.

As additional grounds for rejecting WRTL's claims, the district court opined that "WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating" – *i.e.*, broadcast advertisements identifying a federal candidate during the run-up to an election – on the theory that "such broadcast advertisements 'will *often* convey [a] message of support or opposition' regarding candidates." J.S. App. 8a-9a (citations omitted). The district court also downplayed the First Amendment interests at stake, arguing that "BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs)" or use non-broadcast media to disseminate their message. *Id.* 9a-10a & n.1 (footnote omitted). The court cited *McConnell* and *FEC* v. *Beaumont*, 539 U.S. 146, 162-63 (2003), for the supposed adequacy of "the PAC option" in minimizing the First Amendment harm to WRTL.

SUMMARY OF ARGUMENT

1. When this Court first created the contribution and express advocacy exceptions to protections for political speech, it recognized the questionable nature of the enterprise and strove to limit it, finding only in the most narrow of circum-

stances that a governmental interest in preventing corruption could trump protected speech. The government has since inverted the process, looking first for any proximity to an election as the preeminent question, and second to whether a speech interest exists. Speech jurisprudence is sliding down a slippery slope; prophylaxis is replacing narrow tailoring. It seems that it is now the regulation of speech, not its protection, that has its "fullest and most urgent application" where speech has any attenuated relation to an election.

Proximity to an election, however, is neither a sufficient reason to stifle grass-roots lobbying ninety days a year, nor reason to prevent grass-roots lobbying ("GRL") over certain media. The government presumes incorrectly that there is no such thing as genuine GRL close to an election or, worse, that the possibility that such lobbying could be confused for electioneering is a sufficient reason for banishing it to other parts of the year or to less effective media. Even if this Court is unprepared to reverse its three-decade slide into speech regulation and correct the errors of its earlier decisions, the least it should do is stop extending those errors, recognize some outer bounds of "electioneering," and recognize a legitimate as-applied limitation on BCRA's reach into GRL.

2. Few activities so perfectly combine the essential elements of First Amendment concern as do the exercise of rights to assemble and petition the government for a redress of grievances. GRL is its purest form; the peaceful call for government action made by the People themselves. That this lobbying occurs near an election, lists Senators by name, or is transmitted over effective media are no bases for failing to protect it or distinguish it from electioneering. In this case, the Senate was in session and judicial filibusters were imminent. Generic criticism of the government falls far short of the effective association and petition enshrined in our Constitution.

Furthermore, the evolution of other doctrines has magnified the importance of GRL to democracy from a structural

perspective, as the Court defers increasingly to the political branches. The Court's very advice to citizens – to raise issues with the legislature – is what makes GRL all the more important, particularly as other provisions of federal campaign law have cluttered many avenues for citizen participation in the last three decades. If popular sovereignty is to remain anything but a pretext for governmental authority, GRL must be distinguished meaningfully from electioneering and provided adequate Constitutional protection.

3. Ever since *Buckley* established corruption and its appearance as the compelling government interest supporting campaign finance reform restrictions, that interest has continually been extended to more attenuated situations having less and less to do with corruption or its appearance. In the process, greater swaths of core political speech have been restricted. But the "corruption" interest identified in *Buckley* has serious conceptual flaws, and its extension to concerns such as "undue influence" are deeply troubling and nowhere near as compelling.

Whether or not this Court is willing to reconsider its holdings finding that "corruption" and the appearance of corruption are compelling interests in the abstract, it should at least recognize that such holdings are based on a highly contentious conception of the political process in a democracy and should strive to limit the degree to which it expands such holdings to more attenuated situations.

The government's interest in regulating the GRL at issue in this case is even further attenuated and not at all compelling. Such GRL is not remotely a sham, threatens no appearance of corruption, and whatever influence it might generate relative to an election is not even remotely undue, but rather would be the product of the amount of petitioning support the ads generate from the public. In short, while some electioneering communication may pose the dangers identified in McConnell, the GRL at issue here poses no genuine concern

4. In the case of GRL, the value of the First Amendment activity is high, the government's interest is misconceived in principle and attenuated in application, and the burden imposed by BCRA is substantial. BCRA would regulate precisely that GRL which is most likely to be effective at reaching an audience, inducing assembly and petition, and gaining the attention of the officials being petitioned. Indeed, that is exactly why BCRA regulates broadcast communications in the run-up to an election – because they are most likely to have an influence on the public. The government simply cannot have it both ways – regulating speech because of the effectiveness of its communication and then denying that it imposes a substantial burden on such speech. The non-broadcast media left open by BCRA simply are not effective or adequate alternatives, which is why they were left open to begin with. And the so-called PAC option actually places substantial hurdles in the path of effective GRL, particularly for new or small organizations.

ARGUMENT

The progressive extension of the excuses for regulating core political speech that began with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and peaked in *McConnell* is a paradigm example of the proverbial slippery. What began as narrow exceptions to the First Amendment's jealous protection of political speech are now the unchallenged starting points for attenuated analogies used to support ever-expanding restrictions on core First Amendment activities.

With such growing restrictions on core First Amendment activity, we have gained speed down the slope of a mountain of questionable logic and faulty premises, removing all First Amendment bulwarks that might stop us. Where narrow tailoring was once the rule, prophylaxis is now the order of the day. Where regulation based on the communicative impact of speech was once the greatest First Amendment sin, it is now precisely such impact – speech's ability to influence voters,

and hence elections – that provides the supposed government interest justifying regulation. Long forgotten is the once obvious statement by an earlier Court that the First Amendment has its "fullest and most urgent application" in the context of elections. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971). Such notions now have been replaced by a paradigm demonizing any speech that might possibly *influence* an election, as if influencing elections through speech were somehow a bad thing. It now seems that it is the regulation of speech, not its protection, that has its "fullest and most urgent application" in the context of speech having even an attenuated relation to an election.

Essential First Amendment principles are now so badly inverted that the government actually quotes portions of *Buckley* for precisely the opposite of their original purpose. When it first created the express advocacy exception to protections for political speech, this Court seemed to recognize the questionable nature of its enterprise and strove to limit it by explaining why a broader exception would be inappropriate: "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. Now almost thirty years hence, the government quotes that same passage as its justification for expanding regulation to grass-roots lobbying, noting that "[m]ost electoral advertisements discuss issues of public importance." FEC Motion to Dismiss Appeal at 19 n. 5. What was once an essential justification limiting the scope of restrictions on core speech is now a purported justification for expanding them.

It is time for this Court to step back and survey the destruction from this downhill slide – the abandonment of the most fundamental conceptions of representative democracy, the disregard for the letter and principles of the First Amendment, and the abdication of the judicial duty to defend and

enforce the Constitution most vigorously when incumbent office-holders of the elected branches have every incentive to do it violence.

Hopefully such reflection on the end result of the three-decade slide into regulating political speech will give this Court pause. Even if this Court is unprepared to reverse that slide and correct the errors of its earlier decisions, the very least it should do is stop extending those errors, starting with the recognition of as-applied limitations on BCRA. This case provides just such an opportunity to stop the death-spiral of logic that flows from the flawed premises that led to the *McConnell* decision.

I. GRASS-ROOTS LOBBYING IS CORE POLITICAL SPEECH, ASSEMBLY, AND PETITIONING ACTIVITY THAT IS ESSENTIAL TO VINDICATING THE PEOPLE'S PREEMINENT ROLE IN OUR CONSTITUTIONAL SYSTEM.

There can be no more certain axiom in constitutional law than the proposition that the essential core of the First Amendment is the protection of free and unfettered political speech. Discussion about and criticism of the government in general, our elected representatives in particular, and the various policies or actions being adopted and considered by them are both the essence of and the fundamental predicates for political participation by the People – the ultimate sovereign within our constitutional structure.

Few activities so perfectly combine the essential elements of concern to the First Amendment as does the exercise of the right to assemble and petition the government for a redress of grievances. It involves the discussion and exchange of ideas regarding government conduct among the people being assembled; it involves the communication of those ideas to the government and the individual members thereof whose job it is to represent us; and it involves the peaceful call for government action made by the very source of all authority in our constitutional system, the People. If the First Amendment has

any remaining meaning as a binding restriction on Congress, surely it must mean that such activity cannot be restricted or burdened for anything less than the most compelling and immediate reasons, and even then to the least extent possible.

The activity under review in this case – grass-roots lobbying ("GRL") – is among the purest examples of such fundamental First Amendment activity. The advertisements in question directly address Senate filibusters of judicial nominees, a contentious public policy issue that was and will continue to be a major source of political conflict within Congress and throughout the country. J.S. App. 13a-17a. The advertisements were directed to the ultimate source of legitimate government authority, the People themselves, and indirectly towards the relevant agents of the People, the Senators considering whether to filibuster. The advertisements likewise contained a mixture of information (informing the people that filibusters had occurred and were threatened), argument (analogizing filibusters to various forms of obstruction, delay, and waste of resources), opinion (expressing the view that filibusters are bad), a call to action (asking people to contact their specific Senators and petition them to oppose the filibuster), and a means for many people to easily assemble to accomplish that action (a link to a website facilitating the petitioning of appropriate Senators).

In short, GRL in general and the advertisements here in particular represent virtually "perfect storms" of First Amendment activity, constituting speech, assembly, and petitioning, and facilitating further such activity by the public.

As if that were not enough, the subset of GRL at issue in this case – broadcast communications in close proximity to an election that name specific Senators, one of whom was up for reelection, and that are targeted to those Senators' constituents – constitutes the most meaningful, effective, and essential form of GRL one can imagine.

First, Congress is often in session during the 60 days immediately prior to an election, and voting on issues. In this case, Congress was in session during a substantial portion of the 60 days at issue, with judicial nominees pending and filibusters in place. Issues under consideration before Congress do not go away as elections near, and the importance of GRL during that period continues unabated.

Second, the timing of the communications during the run-up to elections is a critical factor enhancing their potential effectiveness. The only time representatives feel uniquely compelled to listen to the petitions of constituents is precisely when those constituents are preparing to exercise their only genuine power over their representatives and are most likely to retain a meaningful memory of the response to such petitions. Furthermore, the immediate run-up to an election is when the public itself is most focused on the actions of their representatives and is most inclined to be receptive to information, advocacy, and calls for action. The election run-up also forces a decision-point for politicians on numerous issues, demanding that they make or adjust choices on issues in the public eye in order to make a case for their reelection. The pre-election combination of official receptiveness, public focus, and a concentrated decision node thus makes the type of GRL at issue here uniquely vital to the democratic process

Third, naming specific Senators and targeting the relevant electorate – otherwise known as the Senators' constituents – is an inherent and essential aspect of effective GRL. The very point of GRL is to influence congressional action on an issue of concern, and the only realistic means of doing so is to maximize the congruence between the would-be petitioners and the officials being petitioned. Senators and other representatives are primarily, if not exclusively, concerned with the requests and views of their own constituents. Petitions by non-constituents may not be wholly ignored, but those by the "relevant electorate," 2 U.S.C. § 434(f)(3)(2), cannot be ig-

nored without political peril, especially as an election approaches.

Specifically identifying the official to whom subsequent petitions should be addressed likewise is an integral part of any grass-roots lobbying effort. Generic criticism of government conduct without clear information and direction regarding what to do about it is but a pale shadow of effective assembly and petitioning. Identifying the relevant decision-maker and providing information regarding how to contact that decision-maker enhances the chances of subsequent petitioning activity by the target audience. The failure to identify the proper recipient of a proposed petition places the information-gathering burden on individuals, making it more difficult to assemble a large group to petition the government. Naming names thus lies at the heart of effective GRL and likewise at the heart of the First Amendment.[2]

Fourth, GRL promoted and organized through broadcast media is a singularly effective and vital form of such First Amendment activity. This Court itself once recognized that broadcast media are "indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19. And BCRA itself highlights the importance of broadcast communications by specifically targeting them for greater restriction. The very reason broadcast communications are more heavily restricted

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[2] *See* Michael Delli Carpini & Scott Keeter, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 69-71 (1996) (citing studies demonstrating that most Americans do not know where in government responsibility lies for setting and carrying out most government policies); Stephen E. Bennett and Linda Bennett, *Out of Sight Out of Mind: Americans Limited Knowledge of Party Control of the House of Representatives 1960-84*, 35 POL. RES. Q. 67 (1992) (most Americans do not know which party controls Congress, and hence need names in order to act to properly communicate preferences); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1309 (2004) (Citing data showing that during the campaign most voters in elections cannot name a single candidate for office).

is *precisely* because they are more effective at reaching the target audience and hence "influencing" elections. What is accepted by this Court and Congress regarding the greater effectiveness of broadcast communication to influence elections necessarily requires acknowledgment of the unique effectiveness of such communications as the means for GRL to inform, encourage, and enable the public to further petition their representatives. Such broadly communicated speech is a central instrument for pulling together a broad assembly of people to petition the government for a redress of grievance.

Finally, beyond the general and particular attributes of GRL described above, the evolution of other legal doctrines and developments has magnified the importance of GRL from a structural perspective, forcing it to shoulder more of the government-checking burdens that might instead have been borne elsewhere. Such burden-shifting is a function of this Court's long-standing deference to the elected branches, its reluctance to enforce significant constitutional limits on those branches, and its expanding endorsement of restrictions on other forms of core political speech.

In numerous cases seeking to invoke constitutional checks against legislative authority, this Court has adopted a highly deferential approach, advising us that if the public does not like the way the elected branches are exercising such authority they should take it up with their legislators, not with the courts. *See, e.g.*, *Gonzalez* v. *Raich*, -- U.S. --, 125 S. Ct. 2195, 2215 (2005) (rejecting commerce clause challenge and suggesting resort to "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress"); *Munn* v. *Illinois*, 94 U.S. 113, 134 (1877) (rejecting due process challenge and stating that "[f]or protection against abuses by legislatures the people must resort to the polls, not the courts.").[3]

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[3] *See also Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985) (holding that limits on the Commerce Clause power of Con-

But that very advice to raise such issues with the legislature makes GRL all the more important because that is precisely what GRL does. GRL is now one of the few remaining checks on a Congress that has accreted power far beyond that exercised in 1789 and that, in most cases, has little to fear from the deferential constitutional scrutiny applied by the courts. If such fundamental political activity is allowed to be constrained by the very Congress toward which it is directed, then the promise of political checks as adequate substitutes for constitutional checks rings especially hollow indeed. Whether or not resort to political activity can adequately substitute for other constitutional checks, such a substitute necessarily depends on keeping political activity such as GRL as completely free as possible. First Amendment protection for GRL thus represents the type of structural check for which other democratic processes cannot adequately substitute. *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). The loss of such protection taints the remaining processes and tends to feed upon itself.

It is for such reasons, among others, that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 638 (1943). The fundamental rights to speak, assemble, and petition regarding such core matters as the conduct of the government "may not be submitted to vote[,] they depend on the outcome of no

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gress are to be enforced through the political process); *Daniel* v. *Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (rejecting due process challenge and holding that the "forum for the correction of ill-considered legislation is a responsive legislature."); *Peik* v. *Chicago and N.W. Ry. Co.*, 94 U.S. 164, 178 (1876) (rejecting multiple constitutional challenges and noting that "If [the price limit] has been improperly fixed, the legislature, not the courts, must be appealed to for the change.").

elections," and they surely cannot be placed at the mercy of the government itself. *Id.*

While the above matters would seem axiomatic in our constitutional system, they have not been sufficient to prevent this Court from endorsing restrictions on core political speech such as express advocacy regarding candidates or on issue advocacy that might be considered the "functional equivalent" of such express advocacy. *McConnell*, 540 U.S. at 206. Such restrictions have been permitted not because that speech lay outside the core of First Amendment protection, but in spite of the central importance of such speech and based on the misguided view that speech aimed at influencing elections – which would seem to be the very reason it is considered core speech – somehow presents unique dangers that outweigh First Amendment interests. However, having excluded such election-directed speech from any genuine First Amendment protection, GRL is one of the last remaining categories of core political speech with even the potential to remain free and unfettered.

Insofar as the notion of government of the People, by the People, and for the People retains any value whatsoever in our constitutional system, there must be *some* firm First Amendment lines drawn and *some* ground upon which the government may not tread. Of the two fundamental expressions of the sovereignty of the People – advocacy regarding who to elect as our representatives and advocacy regarding what actions those representatives take while in office – the former is already heavily regulated and in no cogent sense "free." Such limitations on speech directly addressing *who* should be elected to office thus exponentially increase the value of remaining speech regarding *what* those elected officials should do while in office. The district court below would now subject this last bastion of the authority of the People to significant government regulation as well. This Court should reject that result or else risk creating a null set of the once-exalted category of *protected* core political speech.

Should that happen, the First Amendment will have lost its most essential function in our democracy and the fundamental role of the People in our system will have been rendered a pale shadow of the lofty vision expressed in the Declaration of Independence and the Constitution.

At the end of the day, this Court should start, proceed, and finish its analysis of this case with the clear and unfettered recognition that GRL embodies the very essence of activities the First Amendment protects. Such central First Amendment value inheres in all GRL. The fundamental category of GRL – speech directed to the public informing, exhorting, and facilitating the exercise of their right to assemble and petition government officials regarding pending or prospective actions by those officials – stands as one of the two crucial First Amendment pillars by which the People exercise their authority in a constitutional system deriving all of its legitimacy from the People. That pillar takes on added importance in light of this Court's allowance of substantial depredations against the other First Amendment pillar supporting the People's role in our system – the right to advocate for the election or defeat of those who would *represent* the People as their agents in government. Failure to exempt from depredation the remaining First Amendment pillar in our constitutional structure may well weaken the edifice beyond repair.

II. THE GOVERNMENT INTEREST IN RESTRICTING GRASS-ROOTS LOBBYING IS ATTENUATED AT BEST AND CERTAINLY IS NOT COMPELLING.

The sole government interest at issue in this case is the asserted but unproven *hypothesis* that GRL organized and advocated by a corporation using general treasury funds has the potential to "corrupt" political office holders who might be thankful for such efforts or to cause the appearance of such

"corruption."[4] That Congress has, *ipse dixit*, declared such hypothesis to be true would hardly seem meaningful if genuine strict scrutiny were applied but, in any event, the hypothesis is flawed both in its conception of "corruption" generally and in its application to GRL in particular.

Before turning to the flaws in applying such reasoning to GRL generally or to the ads at issue in this case, it is useful to review how far the government's asserted interest has strayed from the central concern over corruption and the appearance of corruption as articulated in *Buckley*. 424 U.S. at 25.

A. The Government Interest In Regulating Speech Has Grown More Attenuated Since *Buckley*.

Buckley involved contributions of cash in unlimited quantities directly to present and prospective officeholders. *Id.* While such money could, of course, only be used for speech and associated activities, and thus was not properly viewed as corrupt in the first place, it at least had the simplistic smell of a bribe and the Court took great pains to argue that the First Amendment value of candidate contributions was considerably less than the value of direct expenditures for political

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[4] *See* Stephen Ansolabehere and James M. Snyder, Jr., *Why Is there so Little Money in U.S. Politics*, 17 J. ECON. PERSPECTIVES 105 (2003) (examining 36 published, peer reviewed studies on effects of money in U.S. politics since 1981, and concluding, "the evidence that campaign contributions lead to substantial influence on votes is rather thin * * *. Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes."); Nathaniel Persily and Kelli Lammi, *Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 152 (2004) (concluding on the basis of extensive empirical research that, "Americans' 'confidence in the system of representative government' – specifically, their beliefs that government officials are not 'crooked' and that government is 'run for the benefit of all' – is, to a large extent, related to their position in society, their general tendency to trust others, their philosophy as to what government should do, and their ideological or philosophical disagreement with the policies of those in charge.")

speech. Although calling such contributions corrupt was a stretch, this Court seems committed to it so there is no point in revisiting the serious difficulties of that approach. *But see* Jaffe, McConnell *v.* FEC: *Rationing Speech to Prevent "Undue" Influence*, 2003-2004 CATO SUPREME COURT REVIEW 245, 290-296 (2004) ("*Rationing Speech*") (critiquing the corruption rationale in *Buckley* and *McConnell*).

From the starting point speculating that large contributions can cause actual or perceived corruption, this Court then analogized that coordinated expenditures for speech were comparable to direct contributions. 424 U.S. at 46-47. Of course, that analogy was far from perfect, insofar as even *coordinated* expenditures involve the speech of the third party, not merely speech by proxy, and limiting such expenditures undermines the effectiveness of such speech and free association. That step was a remarkable extension of the rational behind contribution limits, ignoring all of the diminished-speech-value arguments *Buckley* used to justify its watered-down First Amendment approach to contributions. The speech value of coordinated expenditures was considerably higher than *Buckley* had suggested for contributions, and the supposed danger (though perhaps analogous *if* a candidate exerted substantial control, as opposed to mere input, over coordinated efforts) was still less than with contributions over which the candidate exercised full control.

Buckley next looked at uncoordinated expenditures and concluded generally that such expenditures had a higher speech value and a lower danger of actual or perceived corruption and thus were worthy of protection. This Court carved out a narrow exception, however, for expenditures on express advocacy of the election or defeat of a candidate, reasoning that once again such express advocacy was sufficiently analogous to contributions and coordinated expenditures to be regulated as a means of preventing circumvention of the contribution limits. 424 U.S. at 43-44 & n. 52.

But the analogy was again far from perfect and it served to expand the range of regulation to encompass speech that had greater value and posed still less of the supposed danger of corruption than the regulated categories that had come before.[5] In fact, the narrow exception to ordinary First Amendment scrutiny had extended to the very core of political speech. Advocacy of the election or defeat of a candidate – whether express, implied, or otherwise – is a quintessential example of political speech, and whatever degree of appreciation and responsiveness generated from effective political speech seems to be the very point of having periodically elected representatives.

The saving grace in *Buckley*'s treatment of express advocacy was that this Court seemed to recognize the questionable nature of its undertaking and sought to limit the damage by acknowledging the core value of speech discussing *both* issues and candidates, though lacking the magic words of express advocacy. 424 U.S. at 42.

That purported stopping point on the slippery slope was not to last, however, and by the time this Court decided *McConnell*, *Buckley*'s initial corruption rationale had again expanded and was to be "'understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence.'" *Beaumont*, 539 U.S. at 156 (citation omitted). The expansion also included additional reasons for restricting corporate po-

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[5] In upholding the statutory restriction on expenditures "relative to a clearly identified candidate," but only after construing it to apply narrowly to the limited class of express advocacy of the magic-words variety, this Court was responding to vagueness concerns raised by the broad statutory language. But in fact the statutory language was vague only insofar as it was overly *broad*, and many of the concerns discussed by this Court involved such *overbreadth*. It was in that dual context that the Court discussed the inevitable blending of issue advocacy and the discussion of candidates as examples of speech that it thought could not be regulated consistent with the First Amendment. 424 U.S. at 42-45.

litical speech, including the supposed "special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and * * * to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace, and preventing the use of corporations "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Beaumont*, 539 U.S. at 155 (citations and quotation marks omitted).

In *McConnell*, this Court used that expanded palette to extend the express advocacy concept – already attenuated – to speech that contained no such advocacy but that was characterized as the "functional equivalent" of express advocacy and pejoratively called "sham" issue ads. 540 U.S. at 206. Once again, however, the analogy was far from perfect, *see* Dorie E. Apollonio and Margaret A. Carne, *Interest Groups and the Power of Magic Words*, 4 ELEC. L.J. 178 (2005), and served to expand the scope of regulated speech to include increasingly higher value speech with fewer dangers of corruption or its appearance.

It is with this continual descent into government regulation of core political speech in mind that this Court should consider the current challenge to BCRA as applied to GRL.

B. The Government Interest as Applied to GRL Is Highly Attenuated and Not Compelling.

The government now asks this Court to take the next step in its descent by retracting any effective First Amendment protection for GRL that is not remotely a "sham" and that has extensive and independent value wholly apart from any indirect effect it may have on an election. The purported government interest at stake is no longer the actuality or appearance of corruption as conceived in *Buckley*, but rather a nebulous interest in preventing "undue" influence and prophylactically blocking "circumvention" of previous restrictions. The notion of undue influence, however, is a snake pit, without

any coherent baseline of what amount or type of influence is "undue" and what influence is simply part of the ordinary democratic process. *See Rationing Speech*, 2003-2004 CATO SUPREME COURT REVIEW, at 295-96. And prophylaxis as an interest simply feeds upon itself with each new restriction spawning supposed circumvention and the need for further restrictions. But it is odd to characterize efforts to maximize First Amendment activity up to, but not crossing, the boundaries of existing restrictions as "circumvention" of those restrictions unless one wrongly assumes that virtually *any* effort to influence who gets elected and what actions they take is unacceptable. Effective political speech and association used to influence government are not means of *circumventing* restrictions on supposedly improper influence. Rather, they are the constitutionally favored alternatives for achieving desired ends *without* force, bribery, or other improper means. Multiple layers of prophylaxis simply address more and more attenuated risks of the underlying danger and at some point such risks must cease to present compelling interests.[6]

Such overly attenuated risks are precisely what are involved in the GRL context and from the particular ads at issue here.

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[6] Surely this Court must weigh the *magnitude* of a risk, not merely its abstract character, to decide whether it is a compelling justification for a particular restriction or application. *Cf. Van Orden* v. *Perry*, -- U.S. --, 125 S. Ct. 2854, 2871 (2005) (Breyer, J., concurring in the judgment) (Establishment Clause analysis a matter of "degree" in close cases; finding that a mixed message including some religious component did not establish religion). Because mixed messages in political debate may be inevitable to some extent, one should err in favor of permitting high-value speech such as GRL. Otherwise, the only way to eliminate *all* risks associated with election-related speech is to eliminate all freedom of speech, a solution that is anathema to our constitutional system. *Cf.* Federalist No. 10, THE FEDERALIST PAPERS 45-46 (Rossiter & Kesler eds. 1999) (one could eliminate faction "by destroying the liberty which is essential to its existence," but such remedy is "worse than the disease").

First, the messages in this case do not discuss the positions of the named officials regarding judicial filibusters, but rather simply ask the public to petition the Senators to oppose the filibuster. There is no indication whether such urging is for the purpose of trying to discourage a filibuster supporter, sway a fence-sitter, or bolster the resolve of a filibuster opponent. Any implicit support of or opposition to a candidate from such communications will depend largely on the candidate's response to the ensuing petitions, and the implied message of support or opposition would change (for better or worse) insofar as the candidate's position on the issue changed.

Second, the timing of broadcasts in the run-up to the election does not raise the inference that the ads are "shams." Importantly, the timing coincided with the timing of the Senate filibusters from which the relevant legislators were being asked to abstain. The issues subject to GRL do not simply stop as an election approaches, and neither should the right to engage in effective lobbying. Furthermore, the growing proximity of the election made broadcast communication more important for WRTL's legitimate GRL because that is the time when both the public and the incumbents are most attuned to the political issues being debated and are most likely to be responsive to GRL. While that undoubtedly is related to the election itself in a number of ways – enhanced publicity, proximity of an impending decision focusing attention, and, yes, concern over the electoral effects of a particular policy or action – that does not mean the ads are designed to influence the election as opposed to use the proximity of the election to influence the substantive decision to which the GRL is directed. The analogy to direct advocacy and even to "sham" issue ads such as those attacking a politician personally and then mentioning some policy issue in passing is thus considerably weaker and the government interest in regulating such speech is even more attenuated.

Third, even assuming some implied electioneering content to GRL, whether the ads in this case or even future ads that negatively identify a candidate's legislative position, at best such GRL would involve a *mixed message*, not a sham. Such mixed messages are precisely what *Buckley* referred to when limiting restrictions to express advocacy and, as a practical matter, do not pose the same risks of undue influence or gratitude.

Fourth, the notion that GRL might pose a particular danger when coming from a corporation is, at a minimum, more attenuated for a non-profit corporation, and is preposterous in the context of speech the ultimate influence of which is determined by the demonstrable support it receives from the public in the form of resulting petitions to elected officials.

Insofar as the perceived unfairness of corporate wealth being used for expenditures is premised on the notion that corporations can generate speech and influence out of proportion to the strength or support behind their ideas and hence beyond the amount of speech and influence they *ought* to have, that begs the question of what is the "proper" amount of speech and influence. Though failing in its application, *Buckley* at least correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

The disparagement of corporate speakers as "special interests" gives no explanation of how they might pose different harms from a corruption perspective, and whatever added influence comes from central importance such entities might give to a limited range of issues above others hardly consti-

tutes "undue" influence. People everywhere place their energies behind those things that matter most to them and they tend to have influence in proportion to the energy they invest. That is the nature of *all* interests in a democracy, "special" or otherwise. Indeed, if anything, a proliferation of relatively narrow and competing interests was a central and important assumption of the Framers and a key aspect of the checks and balances of our Constitution. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45. The solution to the danger of faction is not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction as it concerned the Founders. Far from being compelling, a desire to decrease special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52.

Finally, in the context of GRL, the danger of undue influence is limited at best because the influence of the group running the advertisement will presumably be a function of how many people actually follow their advice and petition the relevant elected official. Even accepting that such resulting activity will have an influence on an election, it is hardly *undue* in that it is directly tied to the amount of public support generated by the speech in the readily identifiable form of a petition. Unlike generic express advocacy asking people to vote, for which we are never able to determine a direct effect and hence the influence may be misperceived, here we have a direct measure of the effectiveness of the GRL and hence the actual and perceived influence of the organizer will be in direct proportion to the number of people who act on the advice given, not simply on the dollar amount spent on the ad. It is

hard to imagine a form of influence that is more closely aligned with popular support for a particular view.

III. BCRA Imposes Substantial Burdens on Grass-Roots Lobbying.

In light of the essential value of GRL and the attenuated government interest in regulating such speech, assembly, and petitioning activity, all that remains is to determine whether BCRA's electioneering communication restrictions impose a burden on GRL. The answer seems apparent: Not only does BCRA burden GRL, the burden imposed is substantial and directed precisely at the content and communicative impact of the ads in question.

First, on its face BCRA constitutes a content-based restriction expressly targeted to the communicative impact of GRL. Such restrictions are, by definition, substantial for First Amendment purposes wholly apart from their quantitative impact on the speech in question. *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968) (discussing situation in which a statute aimed at suppressing communication could not be sustained).[7]

Second, the suggestion that adequate alternative channels of communication negate the First Amendment burden is misconceived as applied to the content-based restrictions at issue here. Such reasoning only makes sense in the context of neutral time-place-manner restrictions and conduct regulation that only incidentally burdened speech because many government actions can *affect* speech without in any real sense

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[7] A $1 a year tax applied only to speakers who criticize the government would entail a substantial First Amendment burden notwithstanding that it would have essentially no impact on the number of critical speakers or the amount of critical speech.

abridging the freedom of speech, and strict scrutiny in all such cases would grind government to a halt.[8]

In this case, however, BCRA's restrictions on electioneering communications are imposed precisely based on the content of the speech and for the very purpose of suppressing their communicative impact, *i.e.*, their potential for persuading voters and thereby influencing elections. In such instances the First Amendment offense is the attempt to *skew* the public debate in a direction favored by the government, not simply the reduction of speech in total. Whether the government thumb on the scale benefits or burdens particular viewpoints, particular categories of speakers, or particular targets of speech (such as incumbents), the First Amendment concern over such restrictions is the same – manipulation of the public debate by the government. *See Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message * * * pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."); *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.' * * * To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if

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[8] The imposition of ordinary income or sales taxes, for example, reduces private resources available for speech, yet such government action ordinarily does not implicate First Amendment concerns. Even restrictions related to speech in general, though not to its content or communicative impact, are common and necessary features of ordinary living. Noise ordinances and parade permit requirements, for example, may well burden speech to some extent, but without basic rules of the road it would be difficult to maintain civilized co-existence.

directed by the government.") (citation omitted). Such manipulation is a central concern of the First Amendment, and it matters not whether it operates by merely tilting the playing field or by fully suppressing a particular speaker or message. To import the reasoning of adequate alternative channels of communication into this context is thus a troubling and dangerous extension of a narrow line of cases and contributes to the accelerating downhill slide in First Amendment protections for core political speech.

Third, even assuming the importation of the alternative avenues analysis into this context, the option of simply avoiding BCRA's timing, broadcast, or candidate-identification triggers is not an *adequate* alternative given that those triggers are the very same elements of the most effective GRL. *See* Part I, *supra* at 10-12. Indeed, the very point of BCRA limiting its regulation to broadcast media during the run-up to elections was *precisely* because those ads were the most effective form of communicating with the public in a meaningful manner and that the other forms of communication left open were less dangerous precisely because of their diminished communicative effectiveness.[9] And, as applied to GRL in particular, closing off the most effective channels of com-

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[9] To the extent that the government would claim comparable effectiveness of internet or other media communications, that is also an argument for the under-inclusiveness of the restriction and its failure of strict scrutiny. As for any claim that the government may regulate one step at a time, that is an odd suggestion in the context of strict scrutiny rather than rational basis review. It also suggests this Court's inclination to allow further restrictions to the extent that the remaining avenues prove effective at communicating to the public and hence pose similar risks to the purported government interest. Under that reasoning, each time one avenue for political speech is closed, those remaining will become more important, and thus more likely to create "corruption" or its appearance, thus justifying their regulation. That suggestion, of course, is grossly at odds with the notion that adequate avenues remain available insofar as this Court has paved the way to close off those avenues as well. Neither the government nor this Court can have it both ways.

munication will have a cascade effect reducing not just the regulated speech itself but also any resulting petitioning activity as well. Small reductions in the effectiveness of GRL at the front end thus will have amplified speech consequences at the back end that are different and greater than would result from limited burdens on other types of speech.

Fourth, the so-called PAC option likewise is not an adequate alternative. Any previous notion that establishing and maintaining a PAC is a minor administrative task has become increasingly incredible with each new round of legal obligations and restrictions on PACs and those who run them. Just the legal fees alone can be daunting for those venturing into the complex and hazardous waters of political communication. As a practical matter it is becoming impossible for ordinary citizen groups to understand, much less comply with, their obligations without expert legal advice. Only the foolhardy would attempt to join the fray without the burden and expense of such advice. Aside from the legal expense and risk, even the basic compliance obligations of record-keeping and reporting now impose a significant burden and cost, particularly on small or newly founded entities.

Gone is the ability of citizens to quickly and freely associate in support of a position as the timing of issues and the inclination of speakers align. Instead, the so-called PAC option has converted the most effective avenues of communication into a realm of professionals, with the need for substantial advance planning or ready access to existing institutional resources and expertise.

The various funding source, amount, and disclosure requirements for PACs likewise make it difficult to raise the quantities of money needed for broadcast communications. Indeed, the very facts of this case demonstrate that the PAC resources available to groups like WRTL can be wholly inadequate to enable them to use broadcast media for their message. J.S. 6. New or small organizations may have a particularly hard time given the limited number of employees and

members from whom they can solicit at all. Such difficulties in raising PAC money may deprive a PAC of the resources necessary to engage in effective communications at all, or may force small organizations to spend more time raising money than engaging in GRL itself.[10]

Finally, using the PAC option for GRL would compete with other uses for PAC money. Limited PAC resources are already the only means for corporations to make contributions or to engage in express advocacy. Expanding the scope of First Amendment activity forced through the PAC option thus decreases the amounts available for each type of protected activity. And while the limitations on PAC resources previously may have had less of an impact given the limited amounts that can be spent on contributions and express advocacy, the costs of effective broadcast GRL are not so limited and hence PAC funding constraints, as applied to GRL, will have a far more detrimental effect on such activity.

In short, the ability to effectively speak, assemble, and petition the government is not particularly free when forced into the convoluted channels of PAC activity.

Fifth, aside from the direct burden of applying BCRA to GRL, BCRA's restrictions create secondary distortions in the marketplace of ideas that amplify the First Amendment concerns. Because the funding-source limits on the PAC option disproportionately hurt smaller organizations, BCRA tilts the GRL playing field in favor of larger and better-organized entities and commercial entities with greater resources. As a practical matter, the burden of the PAC option will fall on precisely those "grass-roots" groups that rise up in timely re-

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[10] That consequence of the PAC option is particularly ironic given the Vermont campaign finance cases also pending before this Court, Nos. 04-1528, -1530, & -1697, where the State claims an interest (undoubtedly material but hardly "compelling") in avoiding the diversion of elected officials' attention due to the burden of fundraising. Surely the burden of fundraising and the diversion from core political speech constitute similarly material impositions on the exercise of constitutional rights.

sponse to current issues, but will have less of an impact on the large institutional "special" interests that were of supposed concern to Congress. It is the general public that will be deprived of any credible means of organizing themselves on an ad-hoc basis.

Constraining effective GRL also will shift power and influence to incumbents, who have far better alternatives to get out their message in the context of pushing legislative agendas and garnering free media attention. That shift gets things precisely backward, with incumbent representatives able to lobby the public through the mass media, but the public unable to organize and lobby the incumbents through the same means. And such an arrangement also enhances the power of the mainstream media, which can act as the docent of public debate in the key broadcast media, filtering issues as they see fit through the distribution of free airtime, which will inevitably be devoted more to those already in office and in control of the reins of government.

Overall, the burden imposed by applying BCRA to GRL is significant and multifaceted. Given the core value of such speech and the attenuated and misconceived government interest at stake, such burden cannot be justified under the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of United States District Court for the District of Columbia should be reversed.

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